

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 02-33577DM
LULU DAYTON)	
)	Chapter 7
Debtor(s).)	
SEARS ROEBUCK & CO.,)	Adversary Proceeding
)	No. 03-3297DM
Plaintiff,)	
)	
v.)	
)	
LULU DAYTON,)	
)	
Defendant.)	

MEMORANDUM DECISION ON MOTION FOR
ATTORNEY'S FEES UNDER 11 U.S.C. § 523(d)

I. Introduction

The Court has considered the Motion for an Award of Attorney's Fees ("Motion") under 11 U.S.C. § 523(d)¹ filed by counsel for Lulu Dayton ("debtor") seeking recovery of attorney's fees from plaintiff Sears Roebuck & Co. ("Sears"). Upon review of the Motion and all of the papers and arguments of counsel, the court concludes that debtor is entitled to recover attorney's fees under section 523(d), including fees for bringing the Motion.

¹ Unless otherwise indicated, all section and rule references are to the Bankruptcy Code, 11 U.S.C. section 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 II. Background ²

2 In November of 1997, Sears National Bank, a corporate
3 subsidiary of Sears, issued debtor a MasterCard. On October 10,
4 2002, debtor used her Sears MasterCard to pay \$1,127.00 to the San
5 Francisco Department of Parking and Traffic for parking fees and
6 fines. In the same month, debtor also incurred about \$700.00 of
7 additional charges on the account. On December 20, 2002, debtor
8 filed a chapter 7 bankruptcy petition. Debtor retained counsel,
9 paying a flat fee of \$595.00 for handling the bankruptcy case.
10 \$200.00 for the defense of possible non-dischargeability actions
11 was included in the \$595.00 payment.

12 On March 21, 2003, Sears commenced this adversary proceeding
13 against debtor based on the presumption of fraud under section 523
14 (a)(2)(C).³ On July 16, 2003, a trial was held to determine the
15 dischargeability of the debt. Sears failed to demonstrate to the
16 court that debtor's payment of parking fees and fines with her
17 credit card constituted a cash advance within section
18 523(a)(2)(C). The court entered judgment in favor of debtor on
19

20
21 ² The following discussion constitutes the court's findings
of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

22 ³ Section 523(a)(2)(C) provides in relevant part:

23 (C) for purposes of subparagraph (A) of this paragraph,
24 consumer debts owed to a single creditor and aggregating more
25 than \$1,075 for "luxury goods or services" incurred by an
26 individual debtor on or within 60 days before the order for
27 relief under this title, or cash advances aggregating more
than \$1,075 that are extensions of consumer credit under an
open end credit plan obtained by an individual debtor on or
within 60 days before the order for relief under this title,
are presumed to be nondischargeable.

28 11 U.S.C. § 523(a)(2)(C).

1 July 28, 2003. On September 29, 2003, debtor filed a motion for
2 an award of attorney's fees under section 523(d) for \$4,585.00.⁴

3 III. Issues

4 A. Whether debtor can be awarded for attorney's fees pursuant
5 to section 523(d).

6 B. Whether debtor can recover the market rate for
7 attorney's fees.

8 C. Whether debtor can recover attorney's fees for the time
9 spent making the Motion.

10 IV. Analysis

11 A. Debtor is entitled to recover attorney's fees.

12 Section 523(d) authorizes payment of attorney's fees when the
13 court finds that the creditor was not substantially justified in
14 bringing the dischargeability action. 11 U.S.C. § 523(d).⁵ The
15 burden is on the creditor to demonstrate that the action was
16 substantially justified. Elsie Stine v. John Flynn (In re Stine),
17 254 B.R. 244, 249 (9th Cir. BAP 2000); First Card v. Rory Hunt
18 (In re Hunt), 238 F.3d 1098, 1103 (9th Cir. 2000). As recognized

20 ⁴ \$4,585.00 is derived from 26.2 hours at a rate of \$175.00
21 per hour.

22 ⁵ Section 523(d) provides:

23 (d) If a creditor requests a determination of
24 dischargeability of a consumer debt under subsection (a)(2)
25 of this section, and such debt is discharged, the court shall
26 grant judgment in favor of the debtor for the costs of, and a
27 reasonable attorney's fee for the proceeding if the court
finds that the position of the creditor was not substantially
justified, except that the court shall not award such costs
and fees if special circumstances would make the award
unjust.

28 11 U.S.C. § 523(d).

1 by BAP, however, the creditor does not have to win the
2 dischargeability suit. Stine, 254 B.R. at 250. It is sufficient
3 for the creditor to show that it "had a reasonable basis in law or
4 fact, or special circumstances existed." Id. at 244 (citations
5 omitted).

6 In this present case, Sears has not provided any evidence
7 that its actions were reasonably based in law or fact. Sears
8 argues that it "had substantial justification for filing a
9 complaint" without providing this Court with any support for its
10 position. Sears based its entire case on the premise that the
11 payment of parking fees and fines with a credit card was a cash
12 advance under section 523(a)(2)(C). Sears did not attempt to
13 prove liability under section 523(a)(2)(A).⁶ This court finds
14 that Sears was not substantially justified in bringing the non-
15 dischargeability action against debtor.

16 Debtor's credit card statement itself indicates that the
17 payment of parking fees and fines is not a cash advance. The
18 credit card statement shows one payment to the San Francisco
19 Department of Parking and Traffic in the amount of \$1,127.00 on
20 October 10, 2002. There is no notation listed on the statement

21 ⁶ Section 523(a)(2)(A) provides:

22 (a) A discharge under section 727, 1141, 1228(a),
23 1228(b), or 1328(b) of this title does not discharge an
24 individual debtor from any debt - . . .

25 (2)for money, property, services or an extension or
refinancing of credit, to the extent obtained by -
26 (A) false pretenses, a false representation,
or actual fraud, other than a statement
27 respecting the debtor's or an insider's
financial condition [.]

28 11 U.S.C. § 523(a)(2)(A).

1 that indicates this was a cash advance. Moreover, the charge for
2 parking fees and fines appears the same as the non-cash advance
3 charges listed on the account statement.

4 Based on the purpose of section 523(a)(2)(C) and the
5 legislative history, the payment of parking fines and fees is not
6 a cash advance. See S.R. Rep. No. 98-65 at 9. Congressional
7 concern over "loading up" by a debtor prior to bankruptcy lead to
8 the amendment of the Bankruptcy Code in 1984.⁷ Id. The Senate
9 Report provides:

10 A debtor planning a [sic] file a petition with the
11 bankruptcy court has a strong economic incentive to
12 incur dischargeable debts for either consumable goods or
13 exempt property. In many instances, the debtor will go
on a credit buying spree in contemplation of bankruptcy
at a time when the debtor is insolvent.

14 S.R. Rep. No. 98-65 at 9; Citibank (South Dakota), N.A. v. Amjad
15 Eashai (In re Eashai), 87 F.3d 1082, 1092 (9th Cir. 1996)

16 ("Congress enacted 11 U.S.C. section 523(a)(2)(C) to address the
17 problem of the debtor who goes on a spending spree by charging the
18 limits on his credit card and then requests discharge of this
19 credit card debt in bankruptcy"). Congress was concerned about
20 debtors loading up and engaging in shopping sprees within 40 days
21 of the filing of the bankruptcy petition.⁸ S.R. Rep. No. 98-65 at
22 9. Debtor did not purchase any goods, nor receive any services,
23 in excess of \$700.00 and Sears has not sought dischargeability on
24 that amount alone. Debtor's use of the credit card to pay parking

25 ⁷ The Bankruptcy Amendments and Federal Judgeship Act of
26 1984, effective July 10, 1984, amended section 523(a)(2) by adding
27 subparagraph (C).

28 ⁸ The 40 day presumption has been extended to 60 days under
11 U.S.C. § 523(a)(2)(C).

1 fees is not consistent with loading up on consumer goods nor with
2 a shopping spree prior to filing bankruptcy.

3 In a dischargeability action under section 523(a)(2)(C), the
4 United States District Court for the Southern District of New York
5 rejected the creditor's claim that debtor's balance transfer was a
6 cash advance. Citibank Nat'l Credit & Mortgage Services for
7 Citibank v. Linda Welch (In re Welch), 208 B.R. 107, 111 (S.D.
8 N.Y. 1997); see also Nat'l City Bank v. Thomas Manning (In re
9 Manning), 280 B.R. 171, 183-184 (Bankr. S.D. Ohio 2002) (balance
10 transfer does not constitute a cash advance). For the creditor
11 "to satisfy its burden of proof, [it] needed to establish the
12 actual cash advances that [the debtor] received, either through
13 the ATM withdrawals, or by drafting checks for 'cash'." Welch,
14 208 B.R. at 111. Based on the District Court's analysis, cash
15 advances require the use of an ATM or checks drawn on the credit
16 card account that are deposited for cash. Id. There is no
17 evidence here that debtor received cash as any part of the
18 transaction between her and the San Francisco Department of
19 Parking and Traffic. Debtor's payment of the parking fees and
20 fines with her credit card issued by Sears, does not constitute a
21 cash advance.

22 Sears has failed to provide any evidence that the non-
23 dischargeability action was substantially justified. The court's
24 independent research clearly demonstrates that there is no
25 reasonable basis in law or fact to characterize the payment of
26 parking fines and fees as a cash advance subject to non-
27 dischargeability under section 523(a)(2)(C).

28

1 B. Debtor is Entitled to Receive an Award Based on the
2 Market-Rate of Services, despite the attorney-client
agreement.

3 Sears argues that because debtor and her attorney allocated
4 \$200.00 of the total payment to a non-dischargeability defense, an
5 award greater than \$200.00 would be unjust. Debtor responds that
6 the attorney - client agreement is not controlling, and based on
7 Equal Access to Justice ("EAJA") litigation, the fee award should
8 be based on the market rate of services. The court agrees.

9 As argued by debtor, the use of EAJA as a model for attorney's
10 fee awards is appropriate in the context of section 523(d). Hunt,
11 238 F.3d at 1101. "[S]ection 523(d) contains the same
12 'substantially justified' language as the EAJA and was modeled on
13 it". Id.; H.R. Rep. No. 96-1418 at 5.⁹ The market rate should be
14 awarded "*regardless of the fee agreements between the attorney and*
15 *client*". H.R. Rep. No. 96-1418 at 5 (emphasis added). Here,
16 consistent with EAJA, despite the agreement between debtor and her
17 attorney, debtor should receive an award based on the market rate
18 of services multiplied by the hours spent. Id.

19 By allowing debtor to recover less than the prevailing market
20 rate for attorney's fees the purpose of section 523(d) would be

22 ⁹ H.R. Rep. No. 96-1418 at 15 states in relevant part:

23 The Committee, after due consideration, has concluded
24 that amendment of this provision to incorporate the
25 standard for award of attorney fees contained in Equal
26 Access to Justice Act strikes the appropriate balance
27 between protecting the debtor from unreasonable
28 challenges to the dischargeability of debts and not
detering creditors from making challenges when it is
reasonable to do so.

H.R. Rep. No. 96-1418.

1 violated. The purpose of section 523(d) is "to discourage
2 creditors from initiating exception to discharge actions
3 in hopes of obtaining a settlement from an honest debtor anxious
4 to save attorney fees". Daniel Barch v. John Cokkinias (In re
5 Cokkinias), 28 B.R. 304, 307 (Bankr. D. Mass. 1983) (citations
6 omitted)(the bankruptcy court awarded the debtor attorney's fees
7 and costs under section 523(d)). By awarding less than the market
8 rate for attorney's fees, the court would not deter creditors from
9 bringing frivolous non-dischargeability actions.

10 Sears has not specifically challenged the hourly rate charged
11 by debtor's counsel as unreasonable. Based on the court's
12 experience, the hourly rate of \$175.00 charged by debtor's
13 counsel, and the time expended by him in this case, are
14 reasonable.

15 C. Debtor's is Entitled to Receive Attorney's Fees for
16 making a Motion to Receive Fees.

17 In the request for payment of attorney's fees, debtor
18 included an additional \$875.00 for time spent preparing and
19 prosecution of the motion for attorney's fees. Debtor argues that
20 in EAJA litigation, attorney's fees incurred in making the motion
21 to receive attorney's fees are awarded, and by analogy should be
22 awarded here. Debtor is correct.

23 In EAJA litigation, once the court determines that the
24 action was not substantially justified, the claimant can receive
25 attorney's fees including the attorney's fees to get the fee
26 award. INS v. Jean, 496 U.S. 154, 163 (1990). As previously
27 discussed, section 523(d) is modeled on the EAJA and therefore, it
28 is appropriate to award attorney's fees for bringing the motion to

1 receive attorney's fees. Hunt, 238 F.3d at 1101; H.R. Rep. No.
2 96-1418 at 5. This view is also consistent with the bankruptcy
3 code. 11 U.S.C. § 330.

4 Under section 330, the Ninth Circuit awarded attorney's fees
5 for the time spent by counsel on a fee application. In re NuCorp
6 Energy, Inc., 764 F.2d 655, 658-659 (9th Cir. 1985). The Ninth
7 Circuit reasoned that because fee applications are statutorily
8 required, attorneys should be compensated for the time spent
9 preparing the fee application. Id. Similar to section 330,
10 section 523 expressly provides for the award of attorney's fees.
11 11 U.S.C. § 523(d). Moreover, since section 523(d) expressly
12 provides for an award of attorney's fees, it makes no sense not to
13 include fees incurred in making the motion.

14 V. Disposition

15 For reasons stated above, the court is awarding debtor
16 attorney's fees in the amount of \$4,585.00. The court is
17 concurrently entering an order consistent with the memorandum
18 decision.

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20 Dated: February 24 , 2004

21 _____
22 s/ Dennis Montali
23 United States Bankruptcy Judge
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